



ATTORNEY GENERAL OF TEXAS
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January 11, 2005

Mr. Charles W. Schiesser
Enforcement Attorney
Texas Board of Architectural Examiners
P.O. Box 12337
Austin, Texas 78711-2337

OR2005-00366

Dear Mr. Schiesser:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 216783.

The Texas Board of Architectural Examiners (the "board") received a request for contact information pertaining to terminated employees, information pertaining to grievances filed against the board, and all information pertaining to an individual's employment with the board since the date of that individual's hire.¹ You state that some of the requested information has been released, but claim that some of the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.107, 552.111, 552.117, 552.130, and 552.137 of the Government Code.² We have considered the exceptions you claim and reviewed the submitted information.

¹The board sought and received a clarification of some of the information requested. *See* Gov't Code § 552.222 (providing that if request for information is unclear, governmental body may ask requestor to clarify request); *see also* Open Records Decision No. 31 (1974) (when presented with broad requests for information rather than for specific records, governmental body may advise requestor of types of information available so that request may be properly narrowed).

²Although you also assert section 552.024, this section does not except information from release, but instead allows for governmental employees to elect to have specific personal information kept confidential.

Initially, we note that the submitted documents include completed reports, a work authorization contract, and expenditures of completed funds. Section 552.022 of the Government Code provides in relevant part the following:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108;

...

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body;

Gov't Code §552.022(a)(1), (3). The submitted information includes completed evaluations and account information.³ Thus, these documents must be released under section 552.022 unless they are expressly made confidential under other law. Sections 552.101 and 552.136 are "other law" for purposes of section 552.022; accordingly, we will determine whether the information subject to section 552.022 is protected under either section.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. You assert that the submitted documents pertaining to a civil rights claim filed with the Texas Commission on Human Rights and the Equal Employment Opportunity Commission (the "Commission") against the board are confidential under section 2000e-5 of Title 42 of the United States Code. Section 2000e-5(b) provides in relevant part the following:

Whenever a charge is filed by . . . a person claiming to be aggrieved, alleging that an employer . . . has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge . . . and shall make an investigation thereof. . . . Charges shall not be made public by the Commission. . . . Nothing said or done during and as a part of such informal endeavors may be made public by the Commission[.] Any person who makes

³We note that there are other submitted documents that are also subject to section 552.022; however, as you do not assert an exception under the Act to withhold any information within these documents, we do not address them here.

public information in violation of this subsection shall be fined not more than \$1,000 or imprisoned for not more than one year, or both.

42 U.S.C. § 2000e-5(b). We have previously held that section 2000e-5 “only restricts disclosure by those enforcing the Equal Employment Opportunity Act.” *See* Open Records Decision Nos. 245 (1980), 155 (1977), 59 (1974); *Whitaker v. Carney*, 778 F.2d 216 (1985) (Title VII proscribes release of information when held by Commission, but not when held by employer). We also note that no federal statute or regulation prohibits an employer’s disclosure of information relating to a claim of employment discrimination. *See* Open Records Decision Nos. 132 (1976). Thus, none of the submitted information is confidential under section 2000e-5, and the board may not withhold it under section 552.101 of the Government Code on that ground.

You also assert that this same information is confidential under section 552a of Title 5 of the United States Code, also known as the federal Privacy Act. Section 552a provides in part that “[n]o agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains[.]” 5 U.S.C. § 552a(b). However, we note that, for purposes of section 552a, “agency” means an agency, department, corporation, or other instrumentality of the federal government. *See id.* §§ 552(a)(1), 552(f)(1); *see also St. Michael’s Convalescent Hosp. v. State of California*, 643 F.2d 1369, 1373 (9th Cir. 1981) (definition of agency under Privacy Act does not encompass state agencies or bodies); *Shields v. Shetler*, 682 F.Supp. 1172, 1176 (D. Colo. 1988) (Privacy Act does not apply to state agencies or bodies). The board is not an “agency” for purposes of section 552a; thus, the board may not withhold the information at issue under section 552.101 of the Government Code in conjunction with section 552a.

The submitted information contains I-9 forms (Employment Eligibility Verification), which are governed by section 1324a of Title 8 of the United States Code. This section provides that an I-9 form and “any information contained in or appended to such form, may not be used for purposes other than for enforcement of this chapter” and for enforcement of other federal statutes governing crime and criminal investigations. *See* 8 U.S.C. § 1324a(b)(5); *see also* 8 C.F.R. § 274a.2(b)(4). Release of these forms in this instance would be “for purposes other than for enforcement” of the referenced federal statutes. Accordingly, we conclude that the I-9 forms are confidential and may only be released in compliance with the federal laws and regulations governing the employment verification system.

The submitted information also contains W-4 forms. Section 6103(a) of Title 26 of the United States Code provides that tax return information is confidential. *See* 26 U.S.C. § 6103(a)(2), (b)(2)(A), (p)(8); *see also* Open Records Decision No. 600 (1992); Attorney General Op. MW-372 (1981). Accordingly, the board must withhold these forms pursuant to section 552.101 of the Government Code in conjunction with section 6103(a) of Title 26 of the United States Code.

The submitted information also contains social security numbers. Social security numbers may be withheld in some circumstances under section 552.101 of the Government Code in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). *See* Open Records Decision No. 622 (1994). These amendments make confidential social security numbers and related records that are obtained or maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See id.* We have no basis for concluding that any of the social security numbers in the submitted information is confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 on the basis of that federal provision. We caution, however, that section 552.352 of the Government Code imposes criminal penalties for the release of confidential information. Prior to releasing any social security number information, you should ensure that no such information was obtained or is maintained by the board pursuant to any provision of law enacted on or after October 1, 1990.

Section 552.101 also encompasses information protected by common law privacy. Section 552.102 of the Government Code excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976) for information claimed to be protected under the doctrine of common law privacy as incorporated by section 552.101. Accordingly, we address the board's section 552.102 claim in conjunction with its common law privacy claim under section 552.101 of the Government Code.

In *Industrial Foundation*, the Texas Supreme Court stated that information is excepted from disclosure if (1) the information contains highly intimate or embarrassing facts the release of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Indus. Found.*, 540 S.W.2d at 685. The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. This office has found that the following types of information are excepted from required public disclosure under common law privacy: some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps); personal financial information not relating to the financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990); and identities of victims of sexual abuse, *see* Open Records

Decision Nos. 440 (1986), 393 (1983), 339 (1982). We have marked the information that is confidential under common law privacy and must be withheld under section 552.101.

You assert that the submitted settlement agreement is excepted under section 552.107 of the Government Code. Section 552.107(2) provides that “[i]nformation is excepted from the requirements of Section 552.021 if . . . a court by order has prohibited disclosure of the information.” You state that “a court issued an order keeping the contents of the settlement agreement confidential.” Pursuant to section 552.303(c) of the Government Code, on January 4, 2005, this office sent a notice to the board via facsimile requesting that it provide a copy of that court order. In its response of the same day, the board submitted a copy of (1) the release and settlement agreement, which contains a confidentiality provision between the parties, (2) the joint motion for dismissal, and (3) an “Order Granting Joint Motion to Dismiss with Prejudice.” Upon review of this information, we find that the order to dismiss does not on its face make the settlement agreement confidential. We further find that the settlement agreement is not a court order for the purposes of section 552.107(2). Therefore, we conclude that you have not demonstrated that the information is excepted from disclosure under section 552.107(2).⁴

You assert that the submitted correspondence between the Office of the Attorney General and the board is excepted under section 552.111 of the Government Code. Section 552.111 excepts from disclosure “an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.” This section encompasses the attorney work product privilege found in Rule 192.5 of the Texas Rules of Civil Procedure. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000); Open Records Decision No. 677 at 4-8 (2002). Rule 192.5 defines work product as

(1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party’s representatives, including the party’s attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or

(2) a communication made in anticipation of litigation or for trial between a party and the party’s representatives or among a party’s representatives, including the party’s attorneys, consultants, sureties, indemnitors, insurers, employees or agents.

⁴We note that section 552.022(a) makes public a settlement agreement to which a governmental body is a party. Gov’t Code § 552.022(a)(18); *see also* Open Records Decision Nos. 514 at 1 (1988) (“a governmental body cannot close information simply by entering into a contract provision that prohibits disclosure”), 476 at 1-2 (1987), 444 at 6 (1986). In addition, even if the requested information would be subject to section 552.107, a court may not generally order a governmental body to withhold from release information that is subject to section 552.022(a). Gov’t Code § 552.022(b); *see also* Open Records Decision No. 676 at 6 (2002) (section 552.107(1) is not other law that makes information “expressly confidential” for purposes of section 552.022).

A governmental body seeking to withhold information under this exception bears the burden of demonstrating that the information was created or developed for trial or in anticipation of litigation by or for a party or a party's representative. Tex. R. Civ. P. 192.5; ORD 677 at 6-8. In order for this office to conclude that the information was made or developed in anticipation of litigation, we must be satisfied that

- a) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue; and b) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and [created or obtained the information] for the purpose of preparing for such litigation.

Nat'l Tank Co. v. Brotherton, 851 S.W.2d 193, 207 (Tex. 1993). A "substantial chance" of litigation does not mean a statistical probability, but rather "that litigation is more than merely an abstract possibility or unwarranted fear." *Id.* at 204; ORD 677 at 7.

You inform us that the correspondence at issue was made between the Office of the Attorney General and the board "for the purpose of providing legal advice, opinions, and recommendations to the [b]oard" and that it concerns a lawsuit in which the Attorney General was representing the board. After review of your arguments and the submitted information, we conclude that the board may withhold this correspondence, which we have marked, pursuant to section 552.111.

You contend that some of the submitted information may be withheld under section 552.117 of the Government Code. Section 552.117(a)(1) of the Government Code excepts from disclosure the current and former home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024. We note, however, that an individual's personal post office box number is not a "home address" and therefore may not be withheld under section 552.117. *See* Gov't Code § 552.117; Open Records Decision No. 622 at 4 (1994) (purpose of section 552.117 is to protect public employees from being harassed at home); *see also* Open Records Decision No. 658 at 4 (1998) (statutory confidentiality provision must be express and cannot be implied). Whether a particular piece of information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Pursuant to section 552.117(a)(1), the board must withhold this personal information that pertains to a current or former employee of the board who elected, prior to the board's receipt of the request for information, to keep such information confidential. Such information may not be withheld for individuals who did not make a timely election. We have marked information that must be withheld if section 552.117 applies.

You assert that some of the submitted information is excepted under section 552.130 of the Government Code. Section 552.130 provides in relevant part as follows:

(a) Information is excepted from the requirement of Section 552.021 if the information relates to:

(1) a motor vehicle operator's or driver's license or permit issued by an agency of this state; [or]

(2) a motor vehicle title or registration issued by an agency of this state[.]

Gov't Code § 552.130(a). The board must withhold the motor vehicle record information we have marked under section 552.130.

We note that the submitted information contains an insurance policy number and account numbers. Section 552.136 of the Government Code states that "[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." *Id.* § 552.136. Therefore, the board must withhold the information we have marked under section 552.136.

Finally, you assert that some e-mail addresses in the submitted information are excepted under section 552.137 of the Government Code. Section 552.137 of the Government Code excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body" unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See* Gov't Code § 552.137(a)-(c). Section 552.137 does not apply to a government employee's work e-mail address because such an address is not that of the employee as a "member of the public," but is instead the address of the individual as a government employee. The e-mail addresses at issue do not appear to be of a type specifically excluded by section 552.137(c). You do not inform us that a member of the public has affirmatively consented to the release of any e-mail address contained in the submitted materials. The board must, therefore, withhold the e-mail addresses we have marked under section 552.137.

To conclude, pursuant to section 552.101 of the Government Code, the board must withhold (1) the I-9 and W-4 forms under federal law and (2) the marked information that is confidential under common law privacy. Social security numbers may also be confidential under federal law. The board may withhold the marked correspondence under section 552.111. The board must withhold the marked section 552.117 employee information if the employee elected to keep that information confidential before the board received the request for information. Finally, the board must withhold the marked Texas

motor vehicle record information under section 552.130, the marked insurance policy and account numbers under section 552.136, and the marked e-mail addresses under section 552.137. The board must release the remaining information at issue.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

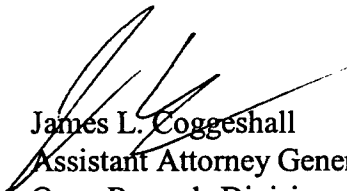
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



James L. Coggeshall
Assistant Attorney General
Open Records Division

JLC/seg

Ref: ID# 216783

Enc. Submitted documents

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(w/o enclosures)